Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

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TERESA ANN COLE,
*Petitioner,*

v.

ALAN LAWS & LAWS AND MURDOCH, P.A.,
*Respondents.*

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On Petition for a Writ of Certiorari
To The Arkansas Supreme Court

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## PETITION FOR A WRIT OF CERTIORARI

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58 pp

## QUESTIONS PRESENTED

The fiduciary duty owed by an attorney to a client is an unusually undeveloped area of law which affects a large percentage of the U.S. population that needs this Court's guidance and clarification to protect attorney-damaged clients.

This petition arises from partial summary judgment granted as a matter of law on a breach of fiduciary duty claim on respondent-attorney's motion, denial of petitioner-client's amended motion for new trial, and the Arkansas Supreme Court's decision to affirm. The Arkansas Supreme Court, without precedent, held that proof of "self-dealing" is required in order to maintain a breach of fiduciary duty claim, and it failed to provide *de novo* review of the summary judgment record when it used the wrong burden of proof plus ignored documents attached to the petitioner's complaint and her responses to the summary judgment motion that negated any affirmative defenses. The questions presented are:

I. Do Arkansas courts violate the federal rights of attorney-damaged clients constitutionally guaranteed under the Due Process Clause of the Fourteenth Amendment when:

A. An existing and rightful cause of action to recover damages for an injury, a property right, is denied because:
   1. An action for breach of fiduciary duty is disallowed unless there's proof in the complaint that the attorney engaged in self-dealing which, thus:
      a. Prevents use of the higher fiduciary duty standard of measure at trial?
      b. Prevents a full and fair trial?

B. Due process of law is withheld by improper *de novo* review of a summary judgment?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the Arkansas Supreme Court which affirmed the orders of the trial judges who improperly granted partial summary judgment on action for breach of fiduciary duty and denied petitioner's amended motion for new trial.

## OPINIONS BELOW

The trial court's order granting partial summary judgment to respondents on the breach of fiduciary duty claim was entered March 23, 2000. (App., *infra*, 1a). Petitioners amended motion for new trial was deemed denied on August 15, 2001. The trial court's order was entered on August 16, 2001. (App., *infra*, 2a). The Arkansas Supreme Court issued its first opinion on June 6, 2002. A timely petition for rehearing and suggestion for review *en banc* was submitted on June 24, 2002 and denied on July 11, 2002. The Arkansas Supreme issued a corrected opinion (App., *infra* 3a - 17a) on August 19, 2002, but refused to change its holding. The corrected opinion is reported at 76 S.W.3d 878.

## JURISDICTION FOR REVIEW

The basis for jurisdiction in this Court is invoked under 28 U.S.C. § 1257 for the opinions cited above.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The pertinent provision from Arkansas statutes on marital property distribution provides in relevant part: "All marital property shall be distributed one-half (½) to each party unless the court finds such a division to be inequitable . . . ." ARK. CODE ANN. § 9-12-315 (Mitchie 2000).

The pertinent provisions from Arkansas Rules of Civil Procedure, Rule 59, New Trial (a) Grounds, provides: "A new trial may be granted . . . on all or part of the claim on the application of the party aggrieved, for any of the following grounds materially affecting the substantial rights of such party: (1) any irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial; . . . and (6) the verdict or decision is clearly contrary to the preponderance of the evidence or is contrary to the law; . . . . " Ark. R. Civ. P. 59(a)(1), (6) (West 2002).

## STATEMENT OF THE CASE

Breach of the fiduciary duty is the core matter which petitioner now brings before this Court in that the lack of uniform or proper interpretation of the fiduciary duty owed by attorneys to their clients by the Arkansas courts has caused violation of petitioner's constitutionally guaranteed federal property rights without due process of law under Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

This case involves a request for this Court's review of the Arkansas Supreme Court's opinion affirming the trial court's grant of partial summary judgment to respondents on a breach of fiduciary duty claim prior to a legal malpractice trial because its decision denied a U.S. Constitutionally guaranteed property right, an existing and rightful cause of action to recover damages for an injury and the trial court's denial of a new trial.

The Arkansas Supreme Court held without precedent that in order to sustain a fiduciary duty action a complaint must show proof that the attorney actually engaged in self-dealing and allege that the attorney personally gained assets or financial benefits at the expense of the client. The Arkansas Supreme Court stated its opinion relied on, "The guiding principle of the fiduciary relationship is that self-dealing, absent the consent of the other party to the relationship, is strictly proscribed. *Hosey v. Burgess*, 319 Ark. 183, 890 S.W.2d 262 (1995)" and "Breach of fiduciary duty involves betrayal of a trust and benefit by the dominant party at the expense of one under his influence. 36A C.J.S., Fiduciary, pp. 388-389 (1961)." Petitioner believes these passages reveal the heart of the court's misinterpretation in this case. Petitioner argues the phrase "that self-dealing, . . . is strictly proscribed" in *Hosey* does not

mean that self-dealing is a required element to sustain the breach of fiduciary duty claim. Moreover, the language of the C.J.S. passage states:

> It is a well-settled equitable rule that anyone acting in a fiduciary relation shall not be permitted to make use of that relation to benefit his own personal interest[1] except with the full knowledge and consent of the other person and such other person must be in possession of all his powers before he can be bound by that knowledge or consent. 36A C.J.S., Fiduciary, pp. 388-389.

Here, the court misinterprets the critical phrase "to benefit his own personal interest" which lists, by footnote, the holdings from three cases including the holding from a 1944 Arkansas case. Turning to the printed text in the 1944 Arkansas case, it states:

> [1] Out of such a relation the law raises the rule that neither party may take selfish advantage of his trust, **or** deal with the subject matter of the trust in such a way as to benefit himself **or prejudice the other** except in the exercise of the utmost good faith and with the full knowledge and consent of the other. (Emphasis added.) *Farrow v. Dermott Drainage Dist.*, C.C.A.Ark, 139 F.2d 800, 805 (1944).

The Arkansas Supreme Court misconstrued the meaning of the second "or" in the footnoted holding giving it the meaning of an "and" instead of its proper "or" meaning. Thus, it ignores the conduct "or prejudice the other" as an independent alternative phrase which causes the court's holding in petitioner's case to be clearly wrong and causes the inequity the Arkansas state courts have forced upon petitioner. Whether the complaint shows proof that the respondent-attorney

engaged in self-dealing and alleges that the attorney attempted or achieved personal gain of assets or financial benefits is clearly not the test for maintaining a breach of fiduciary duty claim in a legal malpractice suit.

Furthermore, the Arkansas Supreme Court withheld due process of law when it failed to provide proper *de novo* review of the summary judgment and improperly recognized respondents' affirmative defenses, since affirmative defenses in this cause of action are treated differently and disregarded or disallowed by other states, and it ignored documents attached to petitioner's complaint and petitioner's responses to the summary judgment motion that would have negated any affirmative defenses. Moreover, a full and fair trial was denied petitioner, when at trial, the jury's measure of respondent's acts was predicated on a lower duty standard that was clearly the wrong standard, a standard less than the higher fiduciary standard, because the jury could only measure respondent's acts based solely on the standards of duty that arise from the negligence and breach of contract claims.

*Proceedings below where federal question was raised* - Following the first trial judge's grant of partial summary judgment on breach of fiduciary duty claim, a second trial judge conducted the malpractice trial on the negligence and breach of contract claims.

When the jury brought a verdict in favor of respondents, petitioner filed a motion for a new trial on April 24, 2001 based on the Arkansas Rules of Civil Procedure, Rule 59(a)(6) which states a new trial may be granted if the verdict or decision is clearly contrary to the preponderance of the evidence. Petitioner's motion and exhibits included respondent's petition to set aside or modify the property settlement agreement in

which respondent had acknowledged the mathematical mistake and resulting financial damage to petitioner.

On July 30, 2001, petitioner filed an amended motion for new trial citing grounds based on the Arkansas Rules of Civil Procedure, Rule 59(a)(1) which states a new trial may be granted for any irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial. Petitioner's amended motion for new trial cited the court's denial of a fair trial and pointed to excerpts of perjured and false testimony by respondent and respondent's expert witness plus the jury's use of a lesser standard to measure respondent's conduct.

In order to show that a federal question was timely and properly raised for this Court's jurisdiction, petitioner restates below the pertinent sections taken from her amended motion for a new trial which was presented to the second trial judge. After the motion and amended motion for a new trial were denied, petitioner timely appealed the earlier summary judgment ruling. The appeal was presented to the Arkansas Court of Appeals but certified to the Arkansas Supreme Court because the issues raised involved the practice of law. Petitioner's appellate brief filed on January 23, 2002 also raised a federal question.

The following reprinted sections from the record show the manner and method that federal questions were first raised:

From Petitioner's Amended Motion for New Trial

2. That ARCP [Arkansas Rules of Civil Procedure] Rule 59(a) provides:
A new trial may be granted to all or any of the parties and

on all or part of the claim on the application of the party aggrieved, for any of the following grounds materially affecting the substantial rights of such party:
(1) any irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial; . . .
(Amend. Motion New Trial Pg. 1)
3. That Plaintiff requests a new trial and relies on 59(a)(1) and, hereby, attaches the following Memorandum Brief in support of her amended motion that irregularities and errors in the proceedings occurred and the earlier Court abused its discretion which prevented Plaintiff from having a fair trial. (Amend. Motion New Trial Pg. 2)
. . .
5. That Plaintiff also asks the Court to review the earlier Court's ruling in granting Defendants's Motion for Summary Judgment for Breach of Fiduciary Duty. To prevent a summary judgment from being granted, one need only to present evidence of a genuine issue of material fact, and Plaintiff did so before the earlier Court but was precluded from using this theory.
(Amend. Motion New Trial Pg. 2 - 3)
. . .
WHEREFORE Plaintiff prays that the Court find that Plaintiff was prejudiced and not given a fair trial . . .
(Amend. Motion New Trial Pg. 3)

And,

<u>From Petitioner's Memorandum Brief in Support of Plaintiff's Motion for New Trial</u>

22. The Supreme Court also states in *Long, et al., v. Lampton and Ergon, Inc.*, 324 Ark. 511, 'This court has repeatedly

stated the issue of what duty is owed, if any, is always a question of law. *First Commercial Trust Co. v. Lorcin Eng'g,* 321 Ark. 210, 900 S.W.2d 202 (1995).['] The Court erred in precluding Plaintiff from arguing her breach of fiduciary duty cause of action to the jury when it granted Defendant's motion for summary judgment. . . .
(Memo. Br. Motion New Trial Pg. 27)

. . .

25. Plaintiff alleged in her Complaint that [quoting from the complaint]:

> 20) The Defendants were the Plaintiff's legal representative in her divorce action. A fiduciary relationship existed between the Defendants and the Plaintiff . . .
>
> 21) The Defendant breached his duty of good faith by failing to compute in advance and during the settlement negotiations the accurate equity figure
>
> . . .
>
> 23) The Defendant abandoned his fiduciary duty to represent the Plaintiff in the utmost and highest capacity by failing to check the equity figures that Plaintiff was questioning. . .
>
> . . .
>
> 25) . . . As a result of his breach of fiduciary duty, the Plaintiff has been damaged in the amount of $65,000.00.

26. The question of whether defendant's conduct breached his fiduciary duty is a question for the jury to consider. Sufficient evidence exists in this case to support a reversal of the granting of Defendant's summary judgment on breach of fiduciary duty based on the information set out in Exhibit "E" containing excerpts of Defendant's deposition testimony stating that Defendant is a divorce attorney, he

had reviewed Plaintiff's file, that Plaintiff provided him with the list of asset valuations based on prior negotiations and a financial statement provided by Mr. Cole, that he did not perform any calculations to determine Plaintiff's settlement, that the calculation was performed by Alex Streett [opposing attorney], that Plaintiff was asking where the settlement figure came from and was trying to figure it out and couldn't, that a mistake was made, and the mistake caused Plaintiff damage . . .
(Memo. Br. Motion New Trial Pg. 28 to 29)
27. To prevent a summary judgment from being granted, one need only to present evidence of a genuine issue of a material fact. Plaintiff did so before the earlier Court but was precluded from using this theory.
28. To succeed on a breach of fiduciary duty, the Plaintiff must show that there was a duty, that that duty was breached, and that the breach[ed] caused the Plaintiff damages, and that the breach was the proximate cause of Plaintiff's damages. (Memo. Br. Motion New Trial Pg. 30)
. . .
29i. Defendant admitted that he did not perform any calculations to determine Plaintiff's settlement, . . .
(Memo. Br. Motion New Trial Pg. 32)
29j. Defendant admitted that the calculation was performed by Alex Streett, . . .
(Memo. Br. Motion New Trial Pg. 34)
. . .
29l. Defendant admitted that a mistake was made and Plaintiff was damaged . . .
(Memo. Br. Motion New Trial Pg. 39)
30. Defendant further admitted that a fiduciary relationship existed during his representation of Plaintiff, and Plaintiff presented a genuine issue of material fact. The earlier trial court, i.e., Judge Smitherman, erred granting

Defendants' motion for summary judgment.
(Memo. Br. Motion New Trial Pg. 40)

Petitioner's motion and amended motion for a new trial was deemed denied on August 15, 2001 and an order denying the motion by the second trial judge was issued on August 16, 2001. (App., *infra*, 2a)

Petitioner timely filed the notice of appeal with the Arkansas Court of Appeals on September 12, 2001. Respondents filed a motion to dismiss, but the motion was denied. Petitioner filed her appellate brief on January 22, 2001, and the Court of Appeals certified the case to the Arkansas Supreme Court because it involved the practice of law.

The pertinent sections of petitioner's appellate brief that raise a federal question are reprinted here:

From the Argument Section of Petitioner's Appellate Brief

I. The special justice erred in its decision to grant summary judgment to appellees on the breach of fiduciary duty claim as a matter of law properly if it based its decision on either:

A . Appellees' defense in the form of client's testimony of satisfaction because the record shows that client's testimony occurred before attorney's mistake was discovered;

B. Indisputable evidence in the form of a chancellor's affidavit, his Order denying petition to set aside the property settlement, and the Court of Appeals Opinion because the chancellor's reasons cited for why he denied the petition were factually mistaken, [he] misstated appellant's testimony, and [he] disparagingly mischaracterized appellant as a female that "had again

merely changed her mind and was trying to back out of an agreement that she had entered into with a full understanding" and, unfortunately, the Court of Appeals relied on the chancellor because it also cited the incorrect version and the facts show:

1. That she did not simply change her mind
2. That she did not back out of the agreement to sell undivided marital assets;
3. That she signed the earlier 1995 marital property settlement;
4. That she did not refuse to sign any other agreement.

II. The special justice erred in its decision to grant summary judgment to appellees on the breach of fiduciary duty claim as a matter of law when the determination of whether appellees' conduct breached the fiduciary duty owed to a client is a question of fact for the jury and:

A. Appellant's complaint included appellees' petition admitting a mathematical mistake had been made, and it raised genuine issues of material fact as to whether appellees had breached their fiduciary duty based on either the attorney-client relationship, the statute [marital property distribution] A.C.A. [Ark. Code Ann.] 9-12-315; the scope of employment for which the attorney was hired; the obligations that arose under the circumstances of the representation, or when appellees attempted to divide appellant's marital property that had pre-established valuations.

B. Appellant's responses to the motion provided evidence that met proof with proof including experts' affidavit and deposition that substantiated the necessary fiduciary duty elements including attorney's wrongdoing, appellant's loss, and that attorney was the proximate cause of appellant's loss.

> III. The special justice's harmful error caused the wrong standard to be used to measure appellees' conduct, and it precluded appellant from her constitutional right to a fair trial.
> (Appellant's Brief Pg. 6)

And also,

> From Points on Appeal Section of Appellant's Brief
> III. . . . U.S. Const. amend. XIV § 2 [sic]
> (Appellant's Brief Pg. vi)

Petitioner furthered stated in her appellate brief that:

> The special justice erred in granting summary judgment as a matter of law because, as the court in *Sexton* explained, whether a breach has occurred or not is a question for the jury to determine. *Sexton*, 329 Ark. 297, 948 S.W.2d at 395 (citing whether attorney breached fiduciary duty to firm was question for jury in action rising from attorney's removal of case files from firm). (Appellate Brief Pg. 14)

And, petitioner's appellate brief restated sections of the complaint:

From Petitioner's Appellate Brief

> Appellant alleged in her complaint [quoted from the complaint]:
>
> - The information furnished to appellant by appellees was not adequate whereby she could give an informed consent;
> - Had appellant been informed the dollar amount was not 50:50, she would not have consented to the property settlement;
> - That appellees failed to advise appellant that she

was not receiving the 50% she desired;

- And to the contrary, appellees assured appellant the dollar figure was the offer he made and that she had earlier endorsed. Add 9 - 29.

(Appellate Brief Pg. 14)

Petitioner's complaint and her responses to the summary judgment motion were not viewed by the courts in the light most favorable to her, and petitioner showed that genuine issues of material fact did exist as to whether respondent's conduct breached the fiduciary duty. Furthermore, throughout petitioner's appellate brief, petitioner pointed to her properly pleaded complaint for breach of fiduciary duty which included the four elements previously required by the court and pointed to the exhibits attached to the complaint which supported those elements. The specific language from petitioner's appellate brief was as follows:

From Petitioner's Appellate Brief

The elements necessary to sustain a fiduciary duty claim are:

First: That [plaintiff has] sustained damages.
Second: That [defendants] owed plaintiffs duties as a fiduciary.
Third: That [defendants] breached his fiduciary duties to the plaintiffs.
Fourth: That such breach of fiduciary duties was a proximate cause of plaintiff[s]' damages. *Long v. Lampton*, 324 Ark. 511, 520, 922 W.W.2d 692, 698 (1996).
(Appellate Brief Pg. 17)

. . .

"This court has repeatedly stated the issue of what duty is owed, if any, is always a question of law." *First Commercial*

*Trust Co. v. Lorcin Eng'g.*, 321 Ark. 210, 900 S.W.2d 202 (1995). The court in *Sexton* explained that whether a breach has occurred or not is a question for the jury to determine. *Id.* (citing whether attorney with law firm breached fiduciary duty was a question for jury).

Other Interests Higher Than Ms. Cole's
[A Subheading in Petitioner's Appellate Brief]

Ms. Cole stated, at paragraph 21 in her complaint, that Laws was being pressured by the Court to get this matter settled or tried. She alleged that Laws put his interest in getting this matter settled and the Court's interest in quickly hearing the matter quickly above Ms. Cole's interest in understanding the settlement. Add 9 - 29. A. 50 - 56, 77 - 80.

When Laws failed to check the settlement figures with Ms. Cole, he was putting his interests or the Court's interest in quickly getting this matter settled or some other interest above his client's interest. By doing so, Laws breached his fiduciary duty to Ms. Cole. Where the fiduciary acts in a manner inconsistent with his obligations to the client, he cannot be seen as a faithful servant. He has ceased to be the loyal, trustworthy representative of the client's interests. (Appellate Brief Pg. 18)

Furthermore, petitioner argued she did not fail to meet proof with proof. Petitioner's responses to the summary judgment motion provided additional and substantial evidence, an expert attorney's affidavit that listed six specific duties that respondents failed to perform and a banker expert's deposition testimony which provided that petitioner had credit available to her to purchase the marital assets at a court ordered sale, if the court ordered one, at the preestablished

asset valuations which would establish the actual damages petitioner sustained. The specific language in the appellate brief was as follows:

> If in fact, Laws established prima facie entitlement to summary judgment, Ms. Cole did not fail to rebut such entitlement. Viewing the pleadings and evidence with respect to the fiduciary duty issue in the light most favorable to appellant, the court should have observed that appellant's responses to the summary judgment motion raised sufficient genuine issues of material fact that were in dispute, or raised sufficient facts that could reasonably be inferred as facts, so as to preclude summary judgment. In her responses, Ms. Cole did not fail to provide additional supporting affidavits or additional evidence which substantiated there were issues in dispute. Ms. Cole's expert Hal Davis' affidavit raised genuine issues of material fact as to whether appellees' conduct breached the duties owed to appellant and stated with particularity the facts upon which his opinion was based. Add 83, 161. Mr. Davis stated six duties appellees failed to perform. Mr. Davis' affidavit points out that dereliction of these six duties shows that Laws was not acting in Ms. Cole's best interests. Appellant's response to the motion also included expert banker's deposition that stated Ms. Cole had credit available to her to purchase the assets at a court sale at her valuations provided the appraisals supported their value, and the subsequent farm appraisal performed by Farm Credit appraised the farm at $271,000.00 - - $2,000.00 higher than Ms. Cole's $269,000.00 valuation! Add 194. And thus, appellant did meet proof with proof with her responses to the motion as required to preclude summary judgment. After appellant met her burden, the special justice, then, erred by granting summary judgment to appellees.

This Court should recognize that:

- Ms. Cole's evidence opposing Laws' motion for summary judgment was sufficient to raise a material fact issue as to whether Laws had a duty to calculate the correct marital property division,
- Ms. Cole did not fail to raise an issue of material fact as to whether Laws breached of [sic] his fiduciary duty, and
- The special justice erred when he granted summary judgment on the breach of fiduciary duty claim.

The Court should conclude that the special justice erred when it granted appellees' motion for summary judgment on the breach of fiduciary duty claim, and it should reverse the special justice's decision and remand to the trial court for litigation.

Expert Affidavit

[A Subheading in Petitioner's Appellate Brief]

The Court should recognize that Ms. Cole's response in opposition to the motion provided substantial evidence in the form of an expert affidavit that sufficiently corroborated the following genuine issues of fact that were disputed: (1) that Laws' duty and performance of that duty should have included the calculation of the proper amount of cash due to Ms. Cole upon the division of the couple's marital property when Laws knew she was relying on him to represent her in the property division, (2) that Laws' failure to do so was a breach of his fiduciary duty that existed and owed to Ms. Cole, and (3) that Laws was the proximate cause of Ms. Cole's loss. The expert affidavit listed six duties that Laws failed to perform and provided that:

- Laws' failure to calculate the accurate numbers and failure to advise Ms. Cole that the settlement figure of $94,500.009 was not in her best interests was the proximate cause of Ms. Cole's loss and
- Laws' failure to check the calculations of opposing counsel to determine if the settlement figure was in the best interest of Ms. Cole was a failure of an affirmative duty; and
- Laws omissions of duty substantiate that Law's representation did not meet the applicable standard of practice. Add 83.

(Appellant's Brief Pg. 24 - 26)

. . .

III. The special justice's error constituted harmful error and precluded appellant [petitioner] from her constitutional right to a fair trial.

Wrong Standard

[A Subheading in Petitioner's Appellate Brief]

The fiduciary duty is a more formidable claim for an attorney to defend because it heightens the duties owed beyond contractual or reasonable standards in negligence and breach of contract. The fiduciary duty can not be distinguished as a higher duty if it is measured by the same standards as other claims.

Although appellees' conduct concerned the same conduct for each claim, the preclusion of the breach of fiduciary duty claim resulted in appellees' conduct being measured by a lower standard and the wrong standard. The granting of appellees' motion for summary judgment on the breach of fiduciary duty claim prevented the correct standard from being used by the jury to measure appellees' conduct and representation.

The result of the special justice's error in striking the breach of fiduciary duty cause of action was harmful error because it lowered the standard that the jury would use, and thus it caused appellees' duty to be lowered. Ms. Cole was harmed and prejudiced by the court's ruling which prevented her constitutional right to a fair trial.
(Appellant's Brief Pg. 27)

. . .

The special justice prevented the correct standard from being used by the jury to assess appellees' conduct and appellant was prejudiced by this error and the error was not harmless error. It prevented appellant from her right to a fair trial.
(Appellant's Brief Pg. 28)

. . .

The special justice erred in granting partial summary judgment to appellees on the breach of fiduciary duty claim as a matter of law because there is a duty to correctly calculate, ascertain, or evaluate an equal marital property settlement either under the attorney-client relationship, A.C.A. [Ark. Code Ann.] 9-12-315, the scope of employment, or the circumstances that arise in the representation and also when an attorney attempts to divide a client's marital property having pre-established valuations.
(Appellant's Brief Pg. 28)

. . .

The special justice's decision constituted harmful error, and it caused substantial prejudice to appellant. This Court should reverse the special justice's decision granting summary judgment on appellant's breach of fiduciary duty claim because appellant did not have a full and fair opportunity in the prior proceeding to litigate the issue of the attorney's breach of fiduciary duty as guaranteed by the

> fourteenth amendment. The judgment of the trial court must be reversed by reason of harmful error, and the ends of justice require that this case be reversed.
> (Appellant's Brief Pg. 29)

The Arkansas Supreme Court affirmed the trial judge's grant of partial summary judgment on June 6, 2002. Petitioner timely filed her petition for rehearing and suggestion for review *en banc* on June 25, 2002. Pertinent passages from this petition are as follows:

From Petition for Rehearing
and Suggestion for Rehearing *En Banc*

> . . . Appellant believes this is a case of first impression which involves a significant public policy issue affecting many Arkansans that will be represented by an attorney in a divorce case where marital property will be distributed and . . . this is an issue that is significant to the governance of the practice of law in Arkansas.
> (Petition for Rehearing Pg. 1)

And,

> The questions at issue are whether this Court erred when it affirmed the trial court's decision granting Appellee's summary judgment motion (Add. 40 - 79) on appellant's breach of fiduciary duty claim in a legal malpractice case.
>
> Appellant raises three points, the Court:
> 1) incorrectly read the key facts, 2) incorrectly used "self-dealing" as a necessary element or misinterpreted "self-dealing" conduct, and 3) used the wrong burden of proof for the breach of fiduciary duty claim and should ignore affirmative defenses.

(Petition for Rehearing Pg. 1)

And,

> . . . Appellee tendered the offer to sell Appellant's one-half interest in two prevalued marital assets to opposing counsel and spouse (Add. 12), and Appellee failed to disclose to her that he did not calculate or ascertain the value of his tendered offer but instead had relied on opposing counsel's miscalculated figure when he presented it to Appellant and he misrepresented it as i) the full value of his offer, ii) his own ascertained figure, and iii) all that Appellant was legally entitled to receive. Thus, Appellee misrepresented and failed to disclose material facts, and then rushed and pressured her to accept it when she questioned its accuracy because she couldn't make the numbers check and he assured her that it accurately represented his full offer. (Add. 14, 18) Appellant relied on this information to make a critical decision, she was harmed $64,500.00[2] by the misinformed decision, and Appellee's acts were the proximate cause.
> (Petition for Rehearing Pg. 1)

Skipping the point 1 argument that the court misread key facts, petitioner argued point 2a, the court was incorrect to require "self-dealing" an essential element of a breach of fiduciary duty claim:

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[2] [The proper amount due Ms. Cole was $159,100.00; the proper calculation was $269,000.00 (dairy farm) + $80,000.00 (dairy cattle) less $30,800.00 (debt on farm) ÷ 2 = $159,100.00; Ms. Cole received $94,500.00 when spouse's attorney calculated $269,000.00 - $80,000.00 ÷ 2 = $94,500.00 which is $64,600.00 less than her rightful equal share.]

The U.S. Supreme Court stated that its Baker case was peculiarly fit for an application of a principle they had been considering. The court stated that on the surface of the case, there were no apparent conflicts of interests, but the attorney discovered the title was imperfect, and thus, it became the duty of the attorney to promptly report the result to Baker, the seller client, as well as to Hurds & Smith, the buyer. Instead, however, the attorney carefully concealed the facts from Baker, gave Hurds & Smith the choice of buying, and upon their declining, bought the property for himself. The Court spoke to the lapse in the attorney's conduct as being potentially excusable but contrasted it with the attorney's subsequent conduct where it said no excuses can exist. However, the Court held, "Both are condemned alike by sound ethics and the law. They are the same upon the subject." *Baker v. Humphrey*, 101 U.S. 494, 499, 502 ([Mich.] 1879). "Actual fraud in such cases is not necessary to give the client a right to redress." *Id.* "A breach of duty is 'constructive fraud' and is sufficient. Story, Eq. Jur. sects [§] 258, 311." *Id.* And, citing an Arkansas case in its Baker opinion, the U.S. Supreme Court further states, "It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive." *Id.* citing *Hoops v. Burnett*, 26 Miss. 428; *Jett v. Hempstead*, 25 Ark. 462; [other cites omitted] . . .

A person standing in fiduciary relationship may be held liable for any conduct that breaches duty imposed by fiduciary relationship. *Sexton*, 948 S.W.2d at 388. "A 'fiduciary relation' exists between attorney and client requiring attorney to act in utmost good faith, the attorney must not only not misrepresent any facts to his client, but there must be an entire absence of concealment or suppression of any facts within attorney's knowledge

> which might influence the client, and the burden of establishing the fairness of the transaction is upon the attorney. This rule is of universal application, and is recognized by all of the text-writers on the subject." *Chavis v. Martin*, 211 Ark. 80, 199 S.W.2d 598, 601 (1947). "A person standing in fiduciary relationship with another is subject to liability to the other for harm resulting from breach of duty imposed by the relationship." *Long v. Lampton*, 922 S.W.2d 692 (Ark. 1996).
> (Petition for Rehearing Pg. 3 - 4)

And,

> The precise duties owed by Appellee as Appellant's agent and fiduciary are determined by the examination of the nature of the tasks Appellee undertook to perform. . . . In the instant case, Appellee was acting as Appellant's agent in a marital property settlement negotiation where Appellee tendered an offer to sell Appellant's interests in two prevalued assets. (Add. 16) Appellant alleges that Appellee had specific fiduciary duties owed to her (Add. 12 - 19, 85) that Appellee breached when he failed to disclose and misrepresented material facts to her, failed to calculate the accurate value of his offer, and reassured her the figure was his full offer, what she desired, and all that she was legally entitled to and pressured her to accept it. Appellant relied on Appellee in making a critical decision and was damaged $64,500.00 due to Appellee's breach. (Add. 16) (Petition for Rehearing Pg. 5)

Petitioner, then argued in the alternative, her point 2b, the court misinterpreted what constitutes self-dealing conduct:

In the alternative, Appellant argues that if "self-dealing" is an essential element, then the Court misinterprets what attorney conduct may be characterized as self-dealing. The Court's opinion implies that a claimant may only utilize the breach of fiduciary duty cause of action when the conduct complained of is "self-dealing," (Add. A-6)[3] i.e., involves deceitful, fraudulent, or secret business transactions involving financial benefits to the attorney and detriment to the client. Appellant argues that putting any "interests" above her interests also constitutes "conflicting" [interests] or "self-dealing." (Add. 12 - 13) This court has stated, "[w]hile it is well settled that an agent is a fiduciary with respect to the matters within the scope of his agency and that it is his duty to further his principals' interests even at the expense of his own in matters connected with the agency." *Yahraus v. Continental Oil Co.*, 218 Ark 872, 239 S.W.2d 594 (1951). . . .
(Petition for Rehearing Pg. 5 - 6)

And,

Here, Appellee did not negotiate the acceptable sale price nor did he consummate the transaction such that the property was exchanged in compliance with the state's marital property distribution statute A.C.A. [Ark. Code

---

[3] Please ignore references to Addendum A because Addendum A was removed at filing of the petition because it caused the petition to exceed the page limit and merely referred to the court's own June 6, 2002 opinion which the clerk assured was readily available to the court.

Ann.] 9-12-315[4] nor did Appellee receive instruction to negotiate differently.[5] (App. 12 - 19) Appellee disregarded and ignored his fiduciary duties even when, as the Court correctly recognized in its opinion, the spouses themselves intended "to share equally" (Add. A-1).[6]
(Petition for Rehearing Pg. 5 - 6)

And, petitioner then argued point 3a that the court used the wrong burden of proof:

---

[4] The purpose of this statute is to effect the equitable distribution of property upon divorce. *Stover v. Stover*, 287 Ark. 116, 696 S.W.2d 750 (1985); *Canady v. Canady*, 290 Ark. 551, 721 S.W.2d 650 (1986); *Yockey v. Yockey*, 25 Ark. App. 321, 758 S.W.2d 421 (1998). The chancellor is given broad powers under this section to distribute all property in divorce, nonmarital as well as marital, to achieve an equitable division; the only requirement is that if he divides marital property other than evenly, or nonmarital property other than by returning it to the original owner, he will consider the nine factors specified in the statute, and fully explain his reasons for the record. Williford v. Williford, 280 Ark. 71, 655 S.W.2d 398 (1983). Where it was obvious from the evidence that it was the joint efforts of the parties which acquired property, it would be inequitable to deprive the wife of the legal and equitable ownership of one-half interest in the property. *Nelson v. Nelson*, 267 Ark. 353, 590 S.W.2d 293 (1979).

[5] A duty imposed by statutory rule extends only to persons in the class intended to be protected by the statute, who suffer harm from a hazard which was intended to be prevented by compliance with the statute. The scope of such a duty is a question of law. *Nance v. Metro Transit Corp*, 3 Wn.App. 99, 473 P.2d 207 (1970). Appellant is in the class intended to be protected by A.C.A. [Ark. Code Ann.] 9-12-315.

[6] Please ignore references to Addendum A because Addendum A was removed at filing of the petition since it caused the petition to exceed the page limitation and merely referred to the court's own June 6, 2002 opinion which was readily available.

The Court failed to recognize that in a claim for breach of fiduciary duty, the allocation of the burden of proof is different and affirmative defenses are not permitted. "Whether an attorney breached fiduciary duty he owed to firm was question for the jury." *Sexton Law Firm, P.A. v. Milligan*, 948 S.W.2d 388 (Ark. 1997). Merely the fact that a plaintiff has accused the fiduciary of acting improperly within the attorney-client relationship causes the attorney to prove that his actions were appropriate. "This requires not just raising a challenge to plaintiff's proof but it requires the defendant-attorney to prove by a preponderance of the evidence that he acted with the utmost loyalty." *Chavis*, 211 Ark. at 85, 199 S.W.2d at 601 citing *Norfleet v. Stewart*, 180 Ark. 161, 20 S.W.2d 868 (1929). "After the plaintiff meets the burden of production by establishing a fiduciary relationship and an alleged breach, the burden shifts to the lawyer to prove that he dealt fairly and candidly with his client." *Chavis*, 211 Ark. at 85, 199 S.W.2d at 601. Chief Justice Hart, for the [Norfleet] court and the Court in Chavis said: "A fiduciary relation exists between attorney and client, and the confidence which the relationship begets between the parties makes it necessary for the attorney to act in the utmost good faith. He must not only not misrepresent any fact to his client, but there must be an entire absence of concealment or suppression of any facts within his knowledge which might influence the client, and the burden of establishing the fairness of the transaction is upon the attorney. This rule is of universal application, and is recognized by all of the text-writers on the subject." *Chavis*, 211 Ark. at 85, 199 S.W.2d at 601 citing *Norfleet*, 20 S.W.2d at 868.

Other courts impose an even higher standard. . . "Once a [fiduciary] relationship is found to exist, the burden of

> proving fair dealing properly shifts to the fiduciary . . . Furthermore, the standard of proof for establishing fair dealing is not the ordinary standard of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence." *Murphy v. Wakelee*, 721 A.2d 1181, 1183-84 (Conn. 1998). "Proof of a fiduciary relationship, therefore, generally imposes a twofold burden on the fiduciary. First, the burden of proof shifts to the fiduciary; and second, the standard of proof is clear and convincing evidence' *Dunham v. Dunham*, 204 Conn. 303, 322-23, 528 A.2d 1123 (1987). The burden of proof rests with the defendant-attorney, not the plaintiff, and it is significantly different than in a professional negligence action. Deborah A. DeMott, Beyond Metaphor: An Analysis of Fiduciary Obligations, 1988 Duke L.J. 879, 880-82 (1988) (contrasting burden of proof). Appellee must prove the relationship and transactions with Appellant were fair to meet his burden. He did not do so. (Add. 40 - 79) (Petition for Rehearing Pg. 7 - 8)

And, petitioner argued that the evidence she presented was sufficient to sustain the claim:

> . . . Appellant argues that her complaint and responses sufficiently provided: (1) specific acts of breach, (2) reliance on Appellee, (3) Appellant's harm, (4) Appellee proximately caused the harm, and (5) damages. (Add. 12 - 19, 83 - 152) If all of Appellant's allegations are taken as true, it cannot be said as a matter of law that Appellee's conduct did not breach any of the fiduciary duties that Appellee owed to Appellant. Appellant's evidence was sufficient to sustain the claim.
> (Petition for Rehearing Pg. 8)

And in support of petitioner's point 3b, petitioner argued the court erred in its *de novo* review because it should have ignored respondent's affirmative defenses:

> This Court erred because few defenses are available in a fiduciary duty claim. "[I]n a breach of fiduciary duty claim, affirmative defenses are not allowed, and this eliminates the jury's consideration of any contributing negligence actions by the principal." *Lepera v. Fuson*, 83 Oh. App. 3d 17, 613 N.E.2d 1060 (Hamilton Co. 1992). The traditional tort defenses of contributory or comparative negligence are also not available in a breach of fiduciary duty claim. *Jackson State Bank v. King*, 844 P.2d 1093, 1096-97 (Wyo. 1993) (stating that comparative negligence is not available as a defense for breach of fiduciary obligations).
> (Petition for Rehearing Pg. 8)
>
> . . .
>
> This Court should have disregarded Chancellor Taylor's affidavit (Add. 56 - 57, 71 - 76) as an affirmative defense because it is not permitted in breach of fiduciary duty claim. In the alternative, Appellant argues this evidence should be ignored because the affidavit had three flaws and would not be admissible evidence at trial. ARE [Arkansas Rules of Evidence] 601, 602, 605. First, it varies with Appellee's own signed petitions (Add. 24 - 29) stating a mistake **was** made which was also used in the previous appeal record (CA 97 - 136), secondly, its corresponding exhibit (Add. 71 - 76) misquotes Appellant's testimony (Add. 74, compare A. 4, R. 548, and again at Add. A-8, full text)[7] changing its whole meaning,[8] and thirdly, it was

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[7] A. 4 and R. 548 are correct, but the repetitious reference "and again at Add. A-8, full text," was merely included in the addendum for the court's convenience; however, the addendum was

> biased and prejudiced on its face.[9] . . . Appellant's June 4, 1996 testimony should not be used as an affirmative defense because logic and consistency show that it occurred before Appellant's discovery of the mistake on June 5, 1996, i.e., Appellant's fax (Add. 23) to Appellee's office. The court must look to the language of the marital distribution statute, its structure, and its legislative purpose in order to ask itself what fiduciary duty would be owed to a divorce client by such law." *Varity Corp. v. Howe*, 116 U.S. Ct 1065 (Iowa 1996). (Petition for Rehearing Pg. 9)

And, finally in the conclusion section of the petition for rehearing, petitioner argued:

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removed at the time of filing due to page limits for the petition.

[8] The Chancellor misstates that Appellant had backed out of other agreements. During separate maintenance, on hearing o[f] Appellant's husband's petition to preserve assets, Appellant reluctantly agreed to sell the couple's assets on the courthouse steps but clarified that ONLY the assets the couple could not agreed to divide would sell. Subsequently, when the chancellor ordered ALL the assets sold, Appellant's attorney objected and the sale was set aside. Appellant did NOT back out of her agreement. The chancellor did not abide by the couple's agreement. The Chancellor misstates Appellant's testimony on this point by not including her clarifying statement which entirely changes Appellant's testimony that the Chancellor presented in his affidavit and in his Order denying Appellee's petition to set aside the marital property settlement. (Chancellor's affidavit at Add. 56 - 57 and exhibit at Add. 71 - 76, specifically compare Add. 72 with Appellant's abstracted testimony at A. 4 and full text at R. 582).

[9] The affidavit shows chancellor's bias and prejudice, "she had again merely changed her mind and was trying to back out of an agreement." (Add. 57).

> This Court should not limit the causes of action because it believes that another claim might better suit the facts of the wrongdoing. By excluding Appellant's right to litigate the fiduciary duty claim, it interfered with Appellant's constitutional right to seek retribution for a valid claim. This court should remove the protective shield surrounding the Arkansas legal profession. . .
>
> The facts in Appellant's appeal were misread and the wrong burden of proof was used; accordingly, Appellee's affirmative defenses should not be not permitted. The "self-dealing" barrier should be removed so that valid claims may be brought. The "self-dealing" doctrine the court imposes is a roadblock to a plaintiff's day in court. (Petition for Rehearing Pg. 9 - 10).

The court denied the petition for rehearing and suggestion for review *en banc* on July 11, 2002. The court issued a corrected opinion on August 19, 2002.

## REASONS FOR GRANTING THE PETITION

Breach of the fiduciary duty by an attorney is the core matter which petitioner now brings before this Court. The Arkansas Supreme Court holds, without precedent, that an additional element of self-dealing is necessary to maintain a breach of fiduciary duty claim. Furthermore, it requires that the complaint provide proof the attorney engaged in self-dealing and allege that the attorney personally gained assets or benefits at the expense of the client. Whether the complaint shows proof that the respondent-attorney engaged in self-dealing and alleges that the attorney attempted or achieved personal gain of assets or financial benefits is clearly not the test for maintaining a breach of fiduciary duty claim in a legal malpractice suit. Breach of the fiduciary duty of utmost good

faith and loyalty does not necessarily result in personal gain of assets or financial benefits. The court's interpretation which is incorrect would require that the defendant-attorney's acts comprise those of actual fraud or theft of the client's property, a duty no higher than a duty upon any other citizen not to commit a crime. The misinterpretation of the fiduciary duty and the acts that would constitute a breach by Arkansas courts causes constitutionally guaranteed federal property rights of attorney-damaged clients to be violated and the Arkansas Supreme Court denies due process of law when it fails to provide proper *de novo* review.

The "self-dealing" barrier is improperly imposed by Arkansas courts. This barrier acts as an iron curtain blocking fundamental principles of justice and fair play. The "self-dealing" barrier prejudices attorney-damaged clients and roadblocks a plaintiff's day in court. This unprecedented "self-dealing" requirement:

- Forms a protective shield surrounding Arkansas attorneys;
- Results in a significant financial incentive for malpractice insurers not to pay valid claims;
- Causes unnecessary litigation to those least able to afford the legal fight, and
- Results in a standard that is far tilted in the defendant-attorney's favor.

The Arkansas Supreme Court's interpretation precludes proper use of the higher fiduciary duty standard to measure attorney's conduct in a malpractice trial, and thus, denies a full and fair trial for an attorney-damaged client.

Viewing petitioner's case as only one example, this Court can be assured that without this Court's review, guidance, and enlightenment on the proper interpretation of the fiduciary duty and the acts that constitute its breach, Arkansas courts are willing to engage in repeated violations of federal property rights and denial of procedural due process of law making a mockery of the fiduciary duty, the highest duty owed to a client by an attorney.

The Arkansas Supreme Court's current interpretation of the fiduciary duty and the acts necessary to breach the duty invalidates the plain meaning of the language in its own opinions in *Norfleet v. Stewart*, 180 Ark. 161, 20 S.W.2d 868 (1929), *Chavis v. Martin*, 211 Ark. 80, 190 S.W.2d 598, 601 (1947), *Yahraus v. Continental Oil Co.*, 218 Ark. 872, 239 S.W.2d 594 (1951), *Long v. Lampton*, 922 S.W.2d 692 (Ark. 1996), and *Sexton Law Firm, P.A., v. Milligan*, 948 S.W. 2d 388 (Ark. 1997) plus those few opinions from this Court in *Baker v. Humphrey*, 101 U.S. 494, 499, 502 ([Mich.] 1879) and *Varity Corp. v. Howe*, 116 U.S. Ct 1065 (Iowa 1996).

Further, the Arkansas Supreme Court denies procedural due process of law guaranteed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution when it uses the wrong burden of proof for the breach of fiduciary duty claim on summary judgment and ignores documents in the record on *de novo* review.

## CONCLUSION

Petitioner Cole respectfully requests that the Court grant the petition for a writ of certiorari and summarily vacate and reverse the judgments below or, in the alternative, order plenary briefing and argument.

Respectfully submitted.

TERESA ANN COLE
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4623 SADDLEBROOK AVENUE
SPRINGDALE, AR 72762
(479) 872-2824

OCTOBER 2002

# APPENDIX

IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS

TERESA ANN COLE PLAINTIFF

V. CASE NO. CIV 99-146

LAWS & MURDOCH, P.A. and
ALLEN LAWS, III DEFENDANTS

ORDER

Came on to be heard the motion for summary judgment of defendants, and the Court, having held a hearing on March 7, 2000, reviewed the pleadings, exhibits hereto, supporting brief and argument of counsel, rules as follows:

1. Defendants' motion as to breach of fiduciary duty is granted; and
2. Defendants' motion as to breach of contract and negligence is denied.

SO ORDERED.

s/Tom Smitherman
Tom Smitherman
Circuit-Chancery Judge
Date March 23, 2000

Approved As To Form:
WRIGHT, LINDSEY & JENNINGS LLP
200 West Capitol Avenue, Suite 2200
Little Rock, Arkansas 72201-3699
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FAX: (501) 376-9442
By s/Bettina E. Brownstein
Bettina E. Brownstein (85019)
Attorney for Defendants

Filed
Circuit & Chancery Clerk
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s/Juanita Barber

THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS

TERESA ANN COLE PLAINTIFF

V. CASE NO. CIV 99-146

LAWS & MURDOCH, P.A. and
ALLEN LAWS, III DEFENDANTS

ORDER
(Deemed denied on August 15, 2001)

The Court, having considered plaintiff's amended motion for new trial and the response thereto, decides that the amended motion should be DENIED.

s/Gerald Pearson
Circuit Judge
Date 8/16/01

Approved As To Form:

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SUPREME COURT OF ARKANSAS
(Opinion on June 6, 2002
Corrected Opinion on August 19, 2002)

Teresa Ann Cole — Appellant
v. — No. 01-1329
Allen Laws, III, and Laws and Murdoch, P.A. — Appellees

Client sued attorney for legal malpractice on theories including breach of fiduciary duty. The Circuit Court, Pope County, Tom Smitherman, J., granted partial summary judgment to attorney on fiduciary duty claim. Client appealed. The Supreme Court, Robert L. Brown, J., held that: (1) notice of appeal was timely; (2) attorney did not engage in self-dealing when during negotiations in divorce action he acquiesced in an apparent mathematical mistake that allegedly resulted in an unequal division of parties' assets; and (3) argument relating to judgment entered on client's remaining claims following jury trial was not proper subject for appeal because client appealed only from order granting partial summary judgment.

Affirmed.

1. CIVIL PROCEDURE - - ARK. R. CIV. P. 54(b) - - APPELLANT'S DECISION TO WAIT TO APPEAL UNTIL ENTRY OF FINAL JUDGMENT WAS CORRECT. - - Where the trial court did not certify the partial summary judgment as appealable pursuant to ARK. R. CIV. P. 54(b), appellant's decision to wait to appeal until entry of a final judgment was correct; at that time, all claims involving all parties had been resolved.

2. APPEAL & ERROR - - FAILURE TO OBTAIN RULINGS BY TRIAL COURT - - ISSUES NOT ADDRESSED ON MERITS. - - Where appellant argued that the trial court erred in granting summary judgment on the fiduciary-duty issue as a matter of law, asserting a number of legal points, the supreme court declined to address several of the issues on the merits due to appellant's failure to preserve those arguments for appeal by obtaining rulings from the trial court.

3. JUDGMENT - - SUMMARY JUDGMENT - - WHEN GRANTED. - - Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law.

4. JUDGMENT - - SUMMARY JUDGMENT - - MEETING PROOF WITH PROOF. - - Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact.

5. JUDGMENT - - SUMMARY JUDGMENT - - APPELLATE REVIEW. - - On appellate review, the supreme court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered; the supreme court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party; appellate review is not limited to the pleadings; the court also focuses on the affidavits and other documents filed by the parties.

6. JUDGMENT - - SUMMARY JUDGMENT - - WHEN DENIED. - - After reviewing undisputed facts, the court should deny

summary judgment if, under the evidence, reasonable persons might reach different conclusions from those undisputed facts.

7. ATTORNEY & CLIENT - - FIDUCIARY DUTY - - UNDIVIDED LOYALTY. - - An attorney owes a client a fiduciary duty of undivided loyalty.

8. FIDUCIARY - - BREACH OF DUTY - - BETRAYAL OF TRUST BY DOMINANT PARTY. - - Breach of fiduciary duty involves betrayal of a trust and benefit by the dominant party at the expense of one under his influence.

9. FIDUCIARY - - BREACH OF DUTY - - LIABILITY. - - A person standing in a fiduciary relationship may be held liable for any conduct that breaches a duty imposed by the fiduciary relationship; regardless of the express terms of an agreement, a fiduciary may be held liable for conduct that does not meet the requisite standards of fair dealing, good faith, honesty, and loyalty.

10. FIDUCIARY - - RELATIONSHIP - - GUIDING PRINCIPLE. - - The guiding principle of the fiduciary relationship is that self-dealing, absent the consent of the other party to the relationship, is strictly proscribed.

11. FIDUCIARY - - BREACH OF DUTY - - SELF-DEALING. - - Self-dealing breaches the fiduciary duty even when the action taken is innocent and unintentional.

12. FIDUCIARY - - BREACH OF DUTY - - no proof that appellee's action amounted to self-dealing. - - Where at no time was it alleged that appellee attorney attempted to procure assets for himself or to obtain any benefit for himself at the

expense of appellant, nor did appellee bargain with an opposing party in order to make a personal gain; and where the undisputed facts gave no indication whatsoever that appellee engaged in self-dealing on the day the subject property-settlement agreement was signed [Court corrected this fact error elsewhere but failed to correct it here. No such agreement or document of any kind was signed on this day.] the supreme court could not say that appellee's interest in obtaining a property-settlement agreement for his client amounted to self-dealing or that the trial court erred in entering summary judgment in appellee's favor.

13. APPEAL & ERROR - - JUDGMENT NOT SUBJECT OF APPEAL - - SUPREME COURT WILL NOT SET ASIDE. - - The supreme court will not set aside a judgment that is not the subject of the appeal; that is the reason the supreme court requires a designation of the order appealed from in the notice of appeal as well as the relevant designation from the record.

Appeal from Pope Circuit Court; Tom Smitherman, Judge; affirmed.

Appellant, pro se.
Wright, Lindsey & Jannings LLP, by: Bettina E. Brownstein, for appellees.

Robert L. Brown, Justice.
This is a legal malpractice case. Appellant Teresa Ann Cole is the former client of the appellees, Allen Laws, III, and his law firm, Laws and Murdoch, P.A. The two appellees will be referred to as Laws for purposes of this opinion. Ms. Cole appeals, *pro se*, the entry of partial summary judgment against her on her claim that Laws breached his fiduciary duty owed to

her.[10]

The present appeal arises from litigation commenced approximately eight years ago. On October 6, 1994, Terry Cole filed for divorce from his wife, Teresa Ann Cole. In March 1996, after firing prior counsel, Ms. Cole hired Laws to represent her. On June 4, 1996, the day of the final hearing on the divorce complaint, the Coles entered into a property settlement agreement.

On that date, the Coles and their attorneys met to reach a final agreement on the distribution of marital property, which was composed primarily of the Coles' cattle ranch and livestock. According to Ms. Cole, the Coles' accountant valued the real property at $269,000 and the livestock at $80,000. Thus, she maintained that the ranch was worth a total of $349,000. There were other marital assets as well. However, this appeal deals solely with the division of the ranch and the livestock.

The Coles decided to enter into a property settlement agreement in which they would share equally in the marital assets. To reach this equal division, Terry Cole would buy Ms. Cole's interest in the ranch and livestock for half of the value. According to Ms. Cole, during the meeting, Terry Cole's lawyer began negotiations by using an erroneous figure of $189,000 as the value of the ranch.[11] His attorney apparently reached this figure by mistakenly subtracting the value of the cattle from the

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[10] Teresa Cole obtained her law license in 2000.

[11] [This is an incorrect fact that the court refused to correct. Mr. Laws began the negotiations with his offer to sell Ms. Cole's interest in the dairy farm and dairy cattle at their pre-established values but relied on opposing attorney's calculation of his offer.]

value of the ranch, instead of adding the two figures together. Again, the two figures added together amounted to $349,000. However, the value of the real property *less* the value of the cattle amounted to $189,000. Terry Cole's attorney used this erroneous lower figure throughout the meeting. It is Laws's alleged failure to correct this error that is the basis of this legal malpractice suit.

Terry Cole's attorney first used the $189,000 figure when he asked Ms. Cole and Laws if half of this figure would amount to $90,500. Laws was busy with another matter, according to Ms. Cole, so Ms. Cole answered the question by pointing out that half of $189,000 would be $94,500, not $90,500. Thereafter, the parties agreed to a property settlement agreement based on the erroneous figure. Later that same day, at the hearing on the divorce complaint, both parties testified that they were satisfied with the property settlement agreement. Specifically, Ms. Cole answered the chancellor's questions as follows:

> Chancellor: You are aware--you are fully aware of the property settlement agreement entered in here today, is that correct; and, are you satisfied with it?
> MS. COLE: Yes, sir.
> CHANCELLOR: Is there anything that we have not discussed in this property settlement agreement that needs to be discussed that may bring this matter back in here?
> MS. COLE: No.
> CHANCELLOR: And are you satisfied with your attorney?
> MS. COLE: Yes, sir.
> CHANCELLOR: Okay. I have advised you on what you're giving up, and we've gone--we've had numerous conversations about the assets and liabilities that were acquired during this marriage, is that correct?
> MS. COLE: Yes.

CHANCELLOR: Okay. You understand what your rights in this property, as well as your obligation under the debts are?
MS. COLE: Yes.
CHANCELLOR: Okay. Based on that you're still--you still think this is a good property settlement agreement in your best interest?
MS. COLE: Yes.

Following this exchange, the chancellor approved the property settlement agreement and entered the divorce decree.

Ms. Cole averred that she did not realize the mathematical mistake until the next morning, on June 5, 1996. She immediately contacted Laws and told him about the error. Laws recognized the mistake as well, according to Ms. Cole, and on June 6, 1996, he filed a motion to set aside the property settlement agreement. On June 24, 1996, he filed an amended motion to set aside. The chancellor denied these motions. Ms. Cole appealed this denial, and the court of appeals affirmed the chancellor's decision in an unpublished opinion. *See Cole v. Cole*, (Ark. App. No. CA 97-136 Dec. 17, 1997).

On May 28, 1999, Ms. Cole filed the present legal malpractice suit against Laws in which she alleged three theories of liability: negligence, breach of contract, and breach of fiduciary duty. She asserted in her action that she was pressured into a quick settlement by Laws. She further asserted that she tried to verify the numbers herself, but that she had difficulty doing so because Laws was talking to Terry Cole at the time when she was trying to do the mathematics. She also asserts that the chancellor pressured the parties to reach the agreement, which was finalized just before the hearing. She contends in her complaint that Laws should have

discovered the mathematical mistake, and his failure to do so amounted to breach of fiduciary duty as well as breach of contract and negligence.

Laws moved for summary judgment on all three claims made in Ms. Cole's complaint. The trial court granted Laws's motion on the breach-of-fiduciary-duty count on March 23, 2000, but allowed the other two counts, breach of contract and negligence, to be tried to a jury. Following the trial, the jury returned a verdict in Laws's favor on both counts, and judgment was entered on July 16, 2001. Ms. Cole appeals from the entry of partial summary judgment on March 23, 2000, but not from the judgment in Laws's favor respecting the breach-of-contract and negligence counts.

*I. Laws's Alleged Procedural Bars*

Laws raises two procedural bars to our consideration of the merits of this case. First, he contends that the notice of appeal was untimely. Secondly, he urges that the summary-judgment order appealed from was not a final, appealable order for purposes of Ark. R. Civ. P. 54(b). Neither of these arguments has merit.

Laws first argues that the notice of appeal was untimely. He points to the fact that the appeal was taken solely from the trial court's March 23, 2000, order of partial summary judgment on breach of fiduciary duty. Thus, Laws argues, Ms. Cole's notice of appeal dated September 12, 2001, was untimely under Ark. R. App. P. -- Civ. 4(a), which requires the notice of appeal to be filed within thirty days of the entry of the order appealed.

Ms. Cole correctly counters with the fact that this argument has already been decided by this court, since we previously

denied a motion to dismiss this appeal which raised the same issue of the lack of a timely notice of appeal. But more importantly, had Ms. Cole filed her notice of appeal after entry of the March 23, 2000 order granting partial summary judgment, the appeal would have been premature under Ark. R. Civ. P. 54(b), because that order appealed from did not resolve all claims involving all parties. *See, e.g., Hambay v. Williams,* 335 Ark. 352, 980 S.W.2d 263 (1998) (order granting partial summary judgment not a final appealable order under Rule 54(b)); *Cordell v. Nadeau,* 321 Ark. 300, 900 S.W.2d 556 (1995) (order granting partial summary judgment was a final appealable order only because trial court certified the order pursuant to Rule 54(b)). In the case before us, the trial court did not certify the partial summary judgment as appealable pursuant to Rule 54(b). Thus, Ms. Cole's decision to wait to appeal until entry of a final judgment was correct. At that time, all claims involving all parties had been resolved.

*II. Summary Judgment*

Ms. Cole's first argument is that the trial court erred in granting summary judgment on the fiduciary-duty issue as a matter of law. She asserts a number of legal points to support this allegation of error. Each point will be taken up individually, but several of her issues will not be addressed on the merits due to her failure to preserve those arguments for appeal by obtaining rulings from the trial court. *Sturgis v. Skokos,* 335 Ark. 41, 977 S.W.2d 217 (1998); *Morrison v. Jennings,* 328 Ark. 278, 943 S.W.2d 559 (1997); *Technical Serv. of Ark., Inc. v. Pledger,* 320 Ark. 333, 896 S.W.2d 433 (1995).

*a. Reliance on Ms. Cole's testimony at the divorce proceeding*

She first asserts that the trial court erred as a matter of law

if it relied on her testimony at the divorce hearing to find that she acquiesced in the mathematical mistake. Her theory is that reliance on this testimony constitutes an error of law because the testimony was taken before she realized the mistake. She devotes, however, a meager two sentences to this argument in her brief and cites no authority to support her contention that the trial court's decision should be reversed on this basis. We will not address this argument due to her failure to obtain a ruling on this matter from the trial court, and, further, due to the fact that the argument is not supported by citation to authority. *See Cadillac Cowboy v. Jackson*, 347 Ark. 963, 69 S.W.3d 383 (2002) (citing *Hart v. McChristian*, 344 Ark. 656, 42 S.W.3d 552 (2001); *Perryman v. Hackler*, 323 Ark. 500, 916 S.W.2d 105 (1996); *Thomson v. Littlefield*, 319 Ark. 648, 893 S.W.2d 788 (1995).

*b. The chancellor's affidavit*

The chancellor in the divorce matter signed an affidavit in support of Laws's motion for summary judgment that he was of the opinion that Ms. Cole had not made a mathematical mistake and that she was a woman who had merely changed her mind. Ms. Cole claims that it was error for the judge to rely on this affidavit in granting partial summary judgment on the fiduciary-duty claim and further that the chancellor inappropriately characterized her actions. This argument was not made to the trial court, and we will not consider it for the first time on appeal for the reasons stated above.

*c. Court of Appeals' opinion*

Ms. Cole also urges that the trial court erred in granting partial summary judgment because he relied on the Court of Appeals' decision in *Cole v. Cole*. There was no ruling obtained on this argument as well, and we will not address it.

*III. Breach of Fiduciary Duty*

Under her point that the trial court erred in entering partial summary judgment against her on the fiduciary-duty issue, Ms. Cole includes two subpoints and a total of eighteen subheadings. Those various subpoints and subheadings can be distilled down to three points:

III. Her claim that Laws breached his fiduciary duty owed to her should have gone to the jury;
IV. Laws is liable to her because he breached a duty to follow the marital property statute, Ark. Code Ann. § 9-12-315 (Repl.2002);
V. Laws is liable to her because he "failed to disclose" the error in the property settlement agreement.

Only the first argument was presented to the trial court. Hence, that is the only argument we will address.

The appropriate standard of review when reviewing a grant of summary judgment has often been announced by this court:

> We have repeatedly held that summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *George v.*

*Jefferson Hosp. Ass'n, Inc.*, 337 Ark. 206, 987 S.W.2d 710 (1999); *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. *Id.* This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998); *Pugh*, 327 Ark. 577, 940 S.W.2d 445. Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties. *Wallace v. [Broyles]*, 331 Ark. 58, 961 S.W.2d 712 (1998); *Angle v. Alexander*, 328 Ark. 714, 945 S.W.2d 933 (1997). After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable men might reach different conclusions from those undisputed facts. *George*, 337 Ark. 206, 987 S.W.2d 710.

*Worth v. City of Rogers*, 341 Ark. 12, 20, 14 S.W.3d 471, 475 (2000). *See also* Ark. R. Civ. P. 56(c)(2).

An attorney owes a client a fiduciary duty of undivided loyalty. *Norfleet v. Stewart*, 180 Ark. 161, 20 S.W.2d 868 (1929). Breach of fiduciary duty involves betrayal of a trust and benefit by the dominant party at the expense of one under his influence. 36A *C.J.S., Fiduciary*, pp. 388-389 (1961). Recently, this court set out the various aspects of the fiduciary relationship:

> [A] person standing in a fiduciary relationship may be held liable for any conduct that breaches a duty imposed by the fiduciary relationship. *Long v. Lampton, supra* [324 Ark. 511, 922 S.W.2d 692 (1996) ]. It follows that, regardless of the express terms of an agreement, a fiduciary may be held liable for conduct that does not meet the requisite standards of fair dealing, good faith, honesty, and loyalty. *See Berry v. Saline Memorial Hosp.*, 322 Ark. 182, 907 S.W.2d 736 (1995); *Texas Oil & Gas Corp. v. Hawkins Oil & Gas, Inc.*, 282 Ark. 268, 668 S.W.2d 16 (1984); *Yahraus v. Continental Oil Co.*, 218 Ark. 872, 239 S.W.2d 594 (1951). The guiding principle of the fiduciary relationship is that self-dealing, absent the consent of the other party to the relationship, is strictly proscribed. *See Hosey v. Burgess*, 319 Ark. 183 890 S.W.2d 262 (1995).

*Sexton Law Firm, P.A. v. Milligan*, 329 Ark. 285, 298, 948 S.W.2d 388, 395 (1997). Self-dealing breaches the fiduciary duty even when the action taken is innocent and unintentional. *Hosey v. Burgess*, 319 Ark. 183, 890 S.W.2d 262 (1995).

The pivotal question therefore becomes whether, under the undisputed facts surrounding the June 4, 1996 meeting, Laws engaged in self-dealing. From our reading of the allegations, Ms. Cole asserts that Laws was sloppy, careless, and hurried on the morning when the property settlement agreement was finalized and that he made a mistake. Further, she claims that through his body language and his demeanor, he implicitly put pressure on her to sign the property settlement agreement. In so doing, she maintains that he put his own interest in reaching an agreement, and the chancellor's interest in having a timely hearing, above her interest, which was to get a full and fair property settlement agreement.

Despite these contentions, we fail to discern any proof that Law's action amounted to self-dealing. It is true that Laws acquiesced in what is alleged to be a mistake to the detriment of his client. That allegation falls more readily into the category of negligence, and the jury returned a verdict in Laws's favor on this claim. However, at no time is it alleged that Laws attempted to procure assets for himself or obtain any benefit for himself at the expense of Ms. Cole. Nor did he bargain with an opposing party in order to make a personal gain. In fact, the undisputed facts give no indication whatsoever that Laws engaged in self-dealing on the day the property settlement agreement was agreed to. We cannot say that Laws's interest in obtaining a property settlement agreement for his client amounted to self-dealing or that the trial court erred in entering summary judgment in Laws's favor.

*IV. Prejudice To Subsequent Trial*

In this point, Ms. Cole challenges the jury's verdict by arguing that the jury trial itself was tainted by the trial court's prior entry of partial summary judgment on the fiduciary-duty claim. This argument, however, is directed to the jury trial and the judgment resulting from the jury trial, and that judgment is not the subject of this appeal. The only order contested on appeal is the order of partial summary judgment. Clearly, this court will not set aside a judgment which is not the subject of the appeal. That is the reason we require a designation of the order appealed from in the notice of appeal as well as the relevant designation from the record. *See* Ark. R. App. P. - - Civ. 3(e) (requiring designation of order appealed and portions of the record on appeal); *Newton County v. Davison*, 289 Ark. 109, 709 S.W.2d 810 (1986). Moreover, were we to hold, as Ms. Cole urges, that jury trials held subsequent to an order of

partial summary judgment are cast into doubt, the result would be to effectively halt the use of partial summary judgments, which we are not inclined to do. This point is meritless.

Affirmed.
IMBER, J., not participating.

Cited as 349 Ark. 177, 76 S.W.3d 878 (2002)

ARKANSAS CODE ANNOTATED
§ 9-12-315

§ 9-12-315 Division of Property.

(a) At the time a divorce decree is entered:

(1)(A) All marital property shall be distributed one-half (1/2) to each party unless the court finds such a division to be inequitable. In that event the court shall make some other division that the court deems equitable taking into consideration:

(i) The length of the marriage;

(ii) Age, health, and station in life of the parties;

(iii) Occupation of the parties;

(iv) Amount and sources of income;

(v) Vocational skills;

(vi) Employability;

(vii) Estate, liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income;

(viii) Contribution of each party in acquisition, preservation, or appreciation of marital property, including services as a homemaker; and

(ix) The federal income tax consequences of the court's division of property.

(B) When property is divided pursuant to the foregoing considerations the court must state its basis and reasons for not dividing the marital property equally between the parties, and the basis and reasons should be recited in the order entered in the matter.

(2) All other property shall be returned to the party who owned it prior to the marriage unless the court shall make some other division that the court deems equitable taking into consideration those factors enumerated in subdivision (a)(1) of this section, in which event the court must state in writing its

basis and reasons for not returning the property to the party who owned it at the time of the marriage.
(3)(A) Every such final order or judgment shall designate the specific real and personal property to which each party is entitled.
(B) When it appears from the evidence in the case to the satisfaction of the court that the real estate is not susceptible of the division as provided for in this section without great prejudice to the parties interested, the court shall order a sale of the real estate. The sale shall be made by a commissioner to be appointed by the court for that purpose at public auction to the highest bidder upon the terms and conditions and at the time and place fixed by the court. The proceeds of every such sale, after deducting the cost and expenses of the sale, including the fee allowed the commissioner by the court for his or her services, shall be paid into the court and by the court divided among the parties in proportion to their respective rights in the premises.
(C) The proceedings for enforcing these orders may be by petition of either party specifying the property the other has failed to restore or deliver, upon which the court may proceed to hear and determine the same in a summary manner after ten (10) days' notice to the opposite party. Such order, judgment, or decree shall be a bar to all claims of dower or curtesy in and to any of the lands or personalty then owned or thereafter acquired by either party.
(4) When stocks, bonds, or other securities issued by a corporation, association, or government entity make up part of the marital property, the court shall designate in its final order or judgment the specific property in securities to which each party is entitled, or after determining the fair market value of the securities, may order and adjudge that the securities be distributed to one (1) party on condition that one-half (1/2) the fair market value of the securities in money or other property

be set aside and distributed to the other party in lieu of division and distribution of the securities.

(b) For the purpose of this section, "marital property" means all property acquired by either spouse subsequent to the marriage except:

(1) Property acquired prior to marriage or by gift or by reason of the death of another, including, but not limited to, life insurance proceeds, payments made under a deferred compensation plan, or an individual retirement account, and property acquired by right of survivorship, by a trust distribution, by bequest or inheritance, or by a payable on death or a transfer on death arrangement;

(2) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;

(3) Property acquired by a spouse after a decree of divorce from bed and board;

(4) Property excluded by valid agreement of the parties;

(5) The increase in value of property acquired prior to marriage or by gift or by reason of the death of another, including, but not limited to, life insurance proceeds, payments made under a deferred compensation plan, or an individual retirement account, and property acquired by right of survivorship, by a trust distribution, by bequest or inheritance, or by a payable on death or a transfer on death arrangement, or in exchange therefor;

(6) Benefits received or to be received from a workers' compensation claim, personal injury claim, or social security claim when those benefits are for any degree of permanent disability or future medical expenses; and

(7) Income from property owned prior to the marriage or from property acquired by gift or by reason of the death of another, including, but not limited to, life insurance proceeds, payments made under a deferred compensation plan, or an individual

retirement account, and property acquired by right of survivorship, by a trust distribution, by bequest or inheritance, or by a payable on death or a transfer on death arrangement, or in exchange therefor.

(c) The court is not required to address the division of property at the time a divorce decree is entered if either party is involved in a bankruptcy proceeding.

ARKANSAS RULES CIVIL PROCEDURE
RULE 59

Rule 59. New Trials

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the claim on the application of the party aggrieved, for any of the following grounds materially affecting the substantial rights of such party: (1) any irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial; (2) misconduct of the jury or prevailing party; (3) accident or surprise which ordinary prudence could not have prevented; (4) excessive damages appearing to have been given under the influence of passion or prejudice; (5) error in the assessment of the amount of recovery, whether too large or too small; (6) the verdict or decision is clearly contrary to the preponderance of the evidence or is contrary to the law; (7) newly discovered evidence material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial; (8) error of law occurring at the trial and objected to by the party making the application. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be filed not later than 10 days after the entry of judgment. A motion made before entry of judgment shall become effective and be treated as filed on the day after the judgment is entered. If the court neither grants nor denies the motion within 30 days of the date on which it is filed or treated as filed, it shall be deemed denied as of the 30th day.

(c) Form of Motion. The motion must be in writing setting forth in separate paragraphs the grounds or assignments of error relied upon for a new trial. The grounds mentioned in section (a)(2), (3) and (7) of this rule must be supported by affidavits showing their truth and may be controverted in the same manner.

(d) Time for Filing Affidavits. When a motion for a new trial is based upon affidavits, they shall be filed with the motion. The opposing party shall have 10 days after service within which to file opposing affidavits which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(e) On Initiative of Court. Not later than 10 days after entry of judgment, the court on its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely filed, for a reason not stated in the motion. In either case, the court shall specify in the order the ground therefor.

(f) Motion for New Trial Not Necessary for Appeal. A motion for a new trial shall not be necessary to preserve for appeal an error which could be the basis for granting a new trial.